Privy Council Appeal No. 5 *of* 1946

Bengal Appeal No. 43 *of* 1943

Mohamed Amin - - - - - - - - *Appellant*

v.

Jogendra Kumar Bannerjee and others - - - *Respondents*

FROM

THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 26TH MARCH, 1947

Present at the Hearing:

LORD UTHWATT

SIR MADHAVAN NAIR

SIR JOHN BEAUMONT

[*Delivered by* SIR JOHN BEAUMONT]

This is an appeal from a judgment and decree of the High Court of Judicature at Fort William in Bengal dated 1st February, 1945, in appeal from its original jurisdiction, which affirmed a judgment and decree of that High Court dated 31st March, 1943, in its original jurisdiction, dismissing the appellant's suit for damages for malicious prosecution.

The question arising in this appeal is:—

> At what stage will criminal proceedings instituted falsely and maliciously before a Magistrate under the provisions of the Indian Code of Criminal Procedure, lay the foundation for a suit for damages for malicious prosecution?

Before dealing with the facts of the case, it will be convenient to notice the relevant provisions of the Code of Criminal Procedure. Section 190 so far as relevant enacts that except as thereinafter provided, any Presidency Magistrate, District Magistrate or Sub-divisional Magistrate or other Magistrate therein mentioned may take cognizance of any offence (*a*) upon receiving a complaint of facts which constitute such offence. The exceptions referred to are not relevant to this appeal. Chapter 16 which is headed "Of complaints to Magistrates" contains the following provisions:—

> "Section 200. A Magistrate taking cognizance of an offence on complaint shall at once examine the complainant upon oath and the substance of the examination shall be reduced to writing and shall be signed by the complainant, and also by the Magistrate:
>
> Section 202. (1) Any Magistrate, on receipt of a complaint of an offence of which he is authorized to take cognizance, or which has been transferred to him under section 192, may, if he thinks fit, for reasons to be recorded in writing, postpone the issue of process for compelling the attendance of the person complained against, and either inquire into the case himself or, if he is a Magistrate other

than a Magistrate of the third class, direct an inquiry or investigation to be made by any Magistrate subordinate to him, or by a police-officer, or by such other person as he thinks fit, for the purpose of ascertaining the truth or falsehood of the complaint:

Provided that, save where the complaint has been made by a Court, no such direction shall be made unless the complainant has been examined on oath under the provisions of section 200.

(2A) Any Magistrate inquiring into a case under this section may, if he thinks fit, take evidence of witnesses on oath.

Section 203. The Magistrate before whom a complaint has been made or to whom it has been transferred, may dismiss the complaint, if, after considering the statement on oath (if any) of the complainant and the result of the investigation or inquiry (if any) under section 202, there is in his judgment no sufficient ground for proceeding. In such case he shall briefly record his reasons for so doing."

Chapter 17 which is headed " Of the Commencement of Proceedings before Magistrates " lays down the procedure when the Magistrate decides to issue process upon the complaint.

The relevant facts are these. In March, 1940, an agreement was entered into between the appellant and the 1st respondent which was contained in certain letters whereby the appellant agreed to sell certain property to a company which was to be formed by the 1st respondent. The appellant alleged that subsequently an oral agreement was made between himself and the 1st respondent containing certain provisions which went beyond the written agreement. The 3rd respondent company was incorporated on the 16th April, 1940, in order to carry out the purchase from the appellant, and certain property was transferred by the appellant to such company. Subsequently the appellant took the view that the terms of the oral agreement which he had made with the 1st respondent had not been carried out and accordingly he refused to transfer the rest of the property included in the sale to the company. The dispute, as the learned trial judge in this suit has held, was of a purely civil character and it is unnecessary to discuss the merits of it. On the 16th September, 1940, the 2nd respondent, acting on behalf of himself and the 1st and 3rd respondents, filed a petition of complaint against the appellant in the Court of the Police Magistrate at Sealdah, a suburb of Calcutta, under the provisions of section 190 of the Code of Criminal Procedure. The petition, after setting out the facts relating to the dispute, alleged that as the accused had refused to deliver the remainder of the properties agreed to be sold he had committed an offence under section 422 of the Indian Penal Code or section 406 of such Code in the alternative, and asked that he might be summoned to answer the said charge. The charge was duly registered by the Magistrate on the 16th September, 1940, as a charge of cheating under section 420 of the Indian Penal Code, and it is not disputed that the charge was intended to be one of cheating under section 420 or criminal breach of trust under section 406.

The Magistrate, having taken cognizance of the complaint, forwarded it to a Mr. N. N. Mukherjee for inquiry and report under the provisions of section 202 of the Code. Mr. Mukherjee, by letter dated the 22nd September, 1940, gave the appellent notice that a criminal case had been instituted against him by the 2nd respondent, that it had been referred to the writer for inquiry, and that the inquiry would be held on the 25th October. For some reason, which has not been explained, Mr. Mukherjee did not hold the inquiry, and the Magistrate then referred the matter to a Mr. Bannerjee who also did not hold the inquiry. Thereupon the Magistrate himself held the inquiry in open court. Notice of the inquiry was given to the appellant who attended with counsel. At such inquiry the 1st respondent deposed that " we have brought this case

for cheating us against the accused Md. Amin ". On the 3rd December, 1940, after the completion of the inquiry, the Magistrate made an order, which concluded with these words:—

> " No case of cheating and for the matter of that no criminal case of any nature could be made out by the complainant."

He thereupon dismissed the complaint under section 203 of the Code of Criminal Procedure.

On the 26th June, 1941, the appellant filed this suit against the respondents. The only effective defendants were Nos. 1 to 3 (respondents Nos. 1, 2 and 3). No relief was claimed against defendants (respondents) Nos. 4, 5 and 6. The plaintiff claimed certain relief arising out of the civil dispute with the respondents Nos. 1-3 but this part of his action was dismissed by the trial judge and was not the subject of appeal. The claim relevant to this appeal was for Rs.28,500 for damages for malicious prosecution, made up of costs incurred in his defence to the inquiry, damage to business and damage to reputation.

The case was tried by Mr. Justice Gentle on the Original Side of the High Court. The learned judge held that there was no reasonable and probable cause for the criminal proceedings taken by the respondents, that there was not the slightest justification for filing a criminal complaint, and that the respondents were actuated by malice. The learned judge, however, felt himself bound to follow the case of *Golap Jan* v. *Bholanath Khettry* (I.L.R. 38 Cal. 880) and to hold that the plaintiff's suit failed since there had been in law no prosecution. The learned judge stated that in the absence of authority he would have been inclined to a contrary view and that the only damages which he would have awarded, had the suit succeeded, would have included Rs.1,000 in respect of the costs to which the appellant had been put in connection with the filing of the complaint. He was not satisfied that the loss of business alleged in the plaint had been established, and he did not deal with the claim to damages for loss of reputation. Accordingly, by decree dated the 31st March, 1943, the plaintiff's suit was dismissed.

From that decree the plaintiff filed an appeal and on the 1st February, 1945, the appeal was dismissed. The learned Chief Justice who gave the leading judgment followed the case of *Golap Jan* v. *Bholanath Khettry* and expressed the view that the case was rightly decided.

The first question which arises in this appeal is whether in *Golap Jan's* case the correct principle was applied. The case has been followed in some courts in India and dissented from in others, and their Lordships will examine the position of the authorities.

Golap Jan's case was decided in the year 1911 by a Division Bench of the Calcutta High Court presided over by Sir Lawrence Jenkins, the Chief Justice. A complaint had been made before a Magistrate by the defendant against the plaintiff of criminal breach of trust and the Magistrate had referred the matter for inquiry by the police under section 202 of the Code of Criminal Procedure and on receiving the report of the police, dismissed the complaint under section 203 of the Code. The court held that in those circumstances no prosecution had commenced and accordingly no suit for malicious prosecution would lie. Reliance was placed by the court on the heading to Chapter 17, " The commencement of proceedings before Magistrates ", and it was held that that stage had never been reached. The court also relied on the decision of the English Court of Appeal in *Yates* v. *The Queen* (L.R. 14 Q.B.D. 648) where the learned judges expressed the view that a prosecution could not be said to commence before a person was summoned to answer a complaint But in that case the court was not dealing with a suit for malicious prosecution. It had to decide the question when a criminal prosecution had commenced within the meaning of section 3 of the Newspaper Libel and Registration Act, 1881.

Golap Jan's case was followed in 1912 by a Single Judge in Madras in the case of *K. Sheik Meeran Sahib* v. *C. Ratnavelu Mudali* (I.L.R. 37 Madras 181).

In the same year, namely 1912, in the case of *C. H. Crowdy* v. *L. O. Reilly* (17 C.W.N. 555) a Division Bench of the Calcutta High Court consisting of Mr. Justice Mookerjee and Mr. Justice Beachcroft expressed the view that a suit for damages for malicious prosecution lay whenever the criminal law had been set in motion maliciously and without reasonable cause, and that it was not necessary to show that there had been a prosecution in the restricted sense in which that word is used in the Code of Criminal Procedure. To that extent, the reasoning in *Golap Jan's* case was criticised, but it was distinguished upon the facts, because in the case of *Crowdy* v. *Reilly* the complaint relied on as the foundation of the suit had not asked for the prosecution of the plaintiff but that security proceedings should be taken under section 145 or section 107 of the Code of Criminal Procedure, and the Magistrate had not directed any inquiry.

In the year 1914, the case of *Bishun Persad Narain Singh* v. *Phulman Singh* (19 C.W.N. 935) came before a Bench of the Calcutta High Court consisting again of Mr. Justice Mookerjee and Mr. Justice Beachcroft. In that case the complainant charged the plaintiffs with certain acts of a criminal nature and prayed that security might be taken from them, as otherwise his life and property would be in danger. The Magistrate examined the complainant on oath who gave evidence as to the incidents mentioned in the petition and prayed that proceedings under section 107 of the Code of Criminal Procedure might be taken against the plaintiffs. The Magistrate thereupon referred the matter to the Deputy Magistrate for inquiry and report. The Deputy Magistrate issued notice to the parties and examined a considerable number of witnesses. The Deputy Magistrate in due course submitted his report, and the Magistrate in charge accepted the report and refused to proceed with the complaint. The facts in that case appear to their Lordships in substance to raise the same question as arose on the facts in *Golap Jan's* case, since although the complaint only asked for security proceedings to be taken, it alleged facts on which it would have been open to the Magistrate to frame a criminal charge. The court, following their former decision, held that proceedings under section 107 amounted to a prosecution for the purposes of a suit for malicious prosecution and they further held that under the circumstances of the case the prosecution had commenced. The court was not prepared to accept the reasoning in *Golap Jan's* case and expressed the view that the prosecution—that act of the prosecutor which renders him liable to be cast for damages if malicious, and not based on reasonable and probable cause—commenced when the prosecutor had taken the initial step, namely had made his complaint to the Magistrate. The learned judges further expressed the view that the action for damages for malicious prosecution was not a creature of any statute and that it was wide of the mark to investigate the precise meaning of the expression " prosecution " in the Code of Criminal Procedure, or the exact point of time, when a prosecution may be said to commence within the meaning of that Code.

Bishun Persad Narain Singh's case, was followed in the case of *Gur Saran Dass* v. *Israr Haider* (I.L.R. 2 Lucknow 746) by a Bench of the Chief Court of Oudh where it was held that the essence of an action for malicious prosecution lies in the institution of criminal proceedings and their termination in the plaintiff's favour and that the proceedings started with the issue of the complaint. The Court disagreed with *Golap Jan's* case.

The views expressed in *Bishun Persad Narain Singh's* case were approved by Benches of the Calcutta High Court in *Narendra Nath De* v. *Jyotish Chandra Pal* (I.L.R. 49 Cal. 1035) and in *Rabindra Nath Das* v. *Jogendra Nath Deb* (I.L.R. 56 Cal. 432) though those cases were distinguishable on the facts as they were concerned with applications for sanction to prosecute.

On the other hand, *Golap Jan's* case has been followed by a Bench of the Patna High Court in the case of *Subhag Chamar* v. *Nand Lal Sahu* (I.L.R. 8 Patna 285), by a Bench of the Allahabad High Court in the case of *Ali Muhammad* v. *Zakir Ali* (I.L.R. 53 All. 771) and by a Bench of the Rangoon High Court in the case of *Gowri Singh* v. *Bokka Venkanna* (I.L.R. 13 Rangoon 764).

If *Golap Jan's* case, which was decided 36 years ago, had met with general approval in India, their Lordships might have been prepared to accept it on the principle of *stare decisis*, but, as the above discussion shows, the case has not met with universal approval. Nor can it be said to lay down any principle which may have served as a guide to conduct in other cases. No man can be heard to say that he lodged a false complaint maliciously without any justification in the belief that, though supported by his own oath, the Magistrate would have no difficulty in detecting its falsity and in dismissing it without calling upon the accused. Their Lordships think it right therefore to examine the principle upon which the case was based.

The action for damages for malicious prosecution is part of the common law of England, administered by the High Court at Calcutta under its letters patent. The foundation of the action lies in abuse of the process of the court by wrongfully setting the law in motion and it is designed to discourage the perversion of the machinery of justice for an improper purpose. The plaintiff must prove that the proceedings instituted against him were malicious, without reasonable and probable cause, that they terminated in his favour (if that be possible), and that he has suffered damage. As long ago as 1698 it was held by Holt C.J. in the case of *Savile* v. *Roberts* (1 Ld Raym. 374) that damages might be claimed in such an action under three heads, (1) damage to the person, (2) damage to property, and (3) damage to reputation, and that rule has prevailed ever since. That the word " prosecution " in the title of the action is not used in the technical sense which it bears in Criminal Law is shown by the fact that the action lies for the malicious prosecution of certain classes of civil proceedings, for instance falsely and maliciously presenting a petition in bankruptcy or a petition to wind up a company (*Quartz Hill Consolidated Gold Mining Co.* v. *Eyre* L.R. 11 Q.B.D. 674). The reason why the action does not lie for falsely and maliciously prosecuting an ordinary civil action is, as explained by Bowen L.J. in the last mentioned case, that such a case does not necessarily and naturally involve damage to the party sued. A civil action which is false will be dismissed at the hearing. The defendant's reputation will be cleared of any imputations made against him, and he will be indemnified against his expenses by the award of costs against his opponent. The law does not award damages for mental anxiety, or for extra costs incurred beyond those imposed on the unsuccessful party. But a criminal charge involving scandal to reputation or the possible loss of life or liberty to the party charged does necessarily and naturally involve damage and in such a case damage to reputation will be presumed.

From this consideration of the nature of an action for damages for malicious prosecution emerges the answer to the problem before the Board. To found an action for damages for malicous prosecution based upon criminal proceedings the test is not whether the criminal proceedings have reached a stage at which they may be correctly described as a prosecution; the test is whether such proceedings have reached a stage at which damage to the plaintiff results. Their Lordships are not prepared to go as far as some of the courts in India in saying that the mere presentation of a false complaint which first seeks to set the criminal law in motion will *per se* found an action for damages for malicious prosecution. If the Magistrate dismisses the complaint as disclosing no offence with which he can deal, it may well be that there has been nothing but an unsuccessful attempt to set the criminal law in motion, and no damage to the plaintiff results. But in this case the Magistrate took cognisance of the complaint, examined the complainant on oath, held an inquiry in open court under

section 202 which the plaintiff attended, and at which as the learned judge has found, he incurred costs in defending himself. The plaint alleged the institution of criminal proceedings of a character necessarily involving damage to reputation and gave particulars of special damage alleged to have been suffered by the plaintiff. Their Lordships think that the action was well founded, and on the findings at the trial the plaintiff is entitled to judgment.

As already noted the learned judge was prepared to allow Rs.1,000 as special damage to property, but did not consider the question of damage to the reputation of the plaintiff which the plaint assessed at Rs.25,000. Before this Board, however, counsel for the appellant stated that he did not ask for more than nominal damages and was willing to accept such sum as the Board might award. The parties did not ask for a reference as to damages and in the circumstances their Lordships are prepared to take the course which was taken by the Board in the case of *Nawab Sidhee Nuzur Ally Khan* v. *Rajah Ojoodhyaram Khan* (10 M.I.A. 540) and to assess the damages themselves. They accept the figure of Rs.1,000 which the learned judge would have awarded as special damage, and they assess general damage to reputation at Rs.100.

Their Lordships will therefore humbly advise His Majesty that this appeal be allowed, that the decree of the Appeal Court dated the 1st February, 1945, be set aside and that the decree of Mr. Justice Gentle dated the 31st March, 1943, also be set aside and that judgment be entered for the appellant against respondants 1 to 3 for the sum of Rs.1,100. Respondents Nos. 1-3 must pay the costs of this appeal and of the appeal in India and half of the appellant's cost of the trial.

(56412) Wt. 8013—5 180 4/47 D.L. G. 338

In the Privy Council

MOHAMED AMIN

v.

JOGENDRA KUMAR BANNERJEE
AND OTHERS

DELIVERED BY SIR JOHN BEAUMONT

Printed by HIS MAJESTY'S STATIONERY OFFICE PRESS,
DRURY LANE, W.C.2.

1947